**Restrictions to the 1st Amendment**

Obscenity: Obscenity apparently is unique in being the only type of speech to which the

Supreme Court has denied First Amendment protection without regard to whether it

is harmful to individuals. According to the Court, there is evidence that, at the time

of the adoption of the First Amendment, obscenity “was outside the protection

intended for speech and press.”4 Consequently, obscenity may be banned simply because a

legislature concludes that banning it protects “the social interest in order and morality.”5 No actual

harm, let alone compelling governmental interest, need be shown in order to ban it.

Child Pornography:

Child pornography is material that visually depicts sexual conduct by children.14 It is unprotected

by the First Amendment even when it is not obscene; i.e., child

pornography need not meet the Miller test to be banned. Because of the legislative

interest in destroying the market for the exploitative use of children, there is no

constitutional right to possess child pornography even in the privacy of one’s own

home.15

Content-Based Restrictions: Justice Holmes, in one of his most famous opinions, wrote:

*The most stringent protection of free speech would not protect a man in falsely*

*shouting fire in a theater and causing a panic.... The question in every case is*

*whether the words used ... create a clear and present danger....*19

In its current formulation of this principle, the Supreme Court held that

“advocacy of the use of force or of law violation” is protected unless “such advocacy

is directed to inciting or producing imminent lawless action and is likely to incite or

produce such action.”20 Similarly, the Court held that a statute prohibiting threats

against the life of the President could be applied only against speech that constitutes

a “true threat,” and not against mere “political hyperbole.”21

Prior Restraint:

When a court issues a temporary restraining order or an injunction against engaging in particular

speech — publishing private Pentagon documents, etc. Usually an order is place upon publishing

said documents in order to not get into the “wrong” hands

Commercial Speech:

“The Constitution ... affords a lesser protection to commercial speech than to

other constitutionally guaranteed expression.”33 Commercial speech is “speech that

proposes a commercial transaction.”34 That books and films are published and sold

for profit does not make them commercial speech; i.e., it does not “prevent them

from being a form of expression whose liberty is safeguarded [to the maximum extent] by the First

Amendment.”35 Commercial speech, however, may be banned

if it is false or misleading, or if it advertises an illegal product or service. Even if fits

in none of these categories, the government may regulate it more than it may regulate

fully protected speech

Defamation: Defamation (libel is written defamation; slander is oral defamation) is the

intentional communication of a falsehood about a person, to someone other than that

person, that injures the person’s reputation. The injured person may sue and recover

damages under state law, unless state law makes the defamation privileged (for

example, a statement made in a judicial, legislative, executive, or administrative

proceeding is ordinarily privileged). Being required to pay damages for a defamatory

statement restricts one’s freedom of speech; defamation, therefore, constitutes an

exception to the First Amendment.

Speech Harmful to Children:

Speech that is otherwise fully protected by the First Amendment may be

restricted in order to protect children. This is because the Court has “recognized that

there is a compelling interest in protecting the physical and psychological well-being

of minors.”85 However, any restriction must be accomplished “‘by narrowly drawn

regulations without unnecessarily interfering with First Amendment freedoms.’ It

is not enough to show that the government’s ends are compelling; the means must be

carefully tailored to achieved those ends.”86

Children’s First Amendment Rights:

In a case upholding high school students’ right to wear black arm bands to

protest the war in Vietnam, the Supreme Court held that public school students do

not “shed their constitutional rights to freedom of speech or expression at the

schoolhouse gate.”94 They do, however, shed them to some extent. The Supreme

Court has upheld the suspension of a student for using a sexual metaphor in a speech

nominating another student for a student office.95 It has upheld censorship of a

student newspaper produced as part of the school curriculum.96 (Lower courts have

indicated that non-school-sponsored student writings may not be censored.97)

Time, Place, and Manner Restrictions:

Even speech that enjoys the most extensive First Amendment protection may

be subject to “regulations of the time, place, and manner of expression which are

content-neutral, are narrowly tailored to serve a significant government interest, and

leave open ample alternative channels of communication.”100 In the case in which

this language appears, the Supreme Court allowed a city ordinance that banned

picketing “before or about” any residence to be enforced to prevent picketing outside

the residence of a doctor who performed abortions, even though the picketing

occurred on a public street. The Court noted that “[t]he First Amendment permits the

government to prohibit offensive speech as intrusive when the ‘captive’ audience

cannot avoid the objectionable speech.”10

Incidental Restrictions:

The Supreme Court has said that an incidental restriction on speech is

constitutional if it is not “greater than necessary to further a substantial governmental

interest.”116 However, the Court has made clear that an incidental restriction, unlike

a content-based restriction, “need not be the least restrictive or least intrusive means”

of furthering a governmental interest. Rather, the restriction must be “narrowly

tailored,” and “the requirement of narrow tailoring is satisfied ‘so long as the ...

regulation promotes a substantial governmental interest that would be achieved less

effectively absent the regulation.’”117

Symbolic Speech:

“The First Amendment literally forbids the abridgment only of ‘speech,’ but we

have long recognized that its protection does not end at the spoken or written

word.”124 Thus wrote the Supreme Court when it held that a statute prohibiting flag

desecration violated the First Amendment. Such a statute is not content-neutral if it

is designed to protect “a perceived need to preserve the flag’s status as a symbol of

our Nation and certain national ideals.”125

Compelled Speech:

On occasion, the government attempts to compel speech rather than to restrict

it. For example, in Riley v. National Federation of the Blind of North Carolina, Inc.,

a North Carolina statute required professional fundraisers for charities to disclose to

potential donors the gross percentage of revenues retained in prior charitable

solicitations.137 The Supreme Court held this unconstitutional, writing:

*There is certainly some difference between compelled speech and compelled*

*silence, but in the context of protected speech, the difference is without*

*constitutional significance, for the First Amendment guarantees “freedom of*

*speech,” a term necessarily comprising the decision of both what to say and what*

*not to say*.138

Radio and Television

In Federal Communications Commission v. Pacifica Foundation, the

Court upheld the power of the FCC “to regulate a radio broadcast that is indecent but

not obscene.”153 The Court cited two distinctions between broadcasting and other

media: “First, the broadcast media have established a uniquely pervasive presence in

the lives of all Americans . . . confront[ing] the citizen, not only in public, but also

in the privacy of the home,” and “Second, broadcasting is uniquely accessible to

children.”1

Freedom of Speech and Government Funding

Congress may regulate matters by attaching conditions to the

receipt of federal funds that it might lack the power to regulate directly. However,

the Court added, “other constitutional provisions may provide an independent bar to

the conditional grant of federal funds.” One of these other constitutional provisions

is the First Amendment. The Court has held, in fact, that the government “may not

deny a benefit to a person on a basis that infringes his constitutionally protected

interests — especially, his interest in freedom of speech.”

Free Speech Rights of Government Employees and Government Contractors

If an employee made political speeches on work time, such that they interfered

with his or others’ job performance, he could likely be fired as “unworthy of

employment.” At the same time, he could not be fired for the particular political

views he expressed, unless his holding of those views made him unfit for the job.

Thus, a governmental employer could not allow employees to make speeches in

support of one political candidate on work time, but not allow employees to make

speeches in support of that candidate’s opponent. But a Secret Service agent

assigned to guard the President would not have the same right as the clerical worker

in Rankin to express the hope that the President be assassinated.